IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-231

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA and THE COUNTY OF NASSAU, NEW YORK,

Petitioners,

v.

WILLIAM T. COLEMAN, JR., ET AL.,

Respondents,

BRITISH AIRWAYS, ET AL.,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND APPENDIX

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners Board of Supervisors of Fairfax County, Virginia and County of Nassau, New York, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on May 19, 1976.

Opinion Below

The order of the Court of Appeals, entered without opinion appears in the Appendix at page 1a.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 19, 1976, and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court rests on 49 U.S.C. §1486(f) and 28 U.S.C. §1254 (1).

Questions Presented

1. Whether the decision of the Secretary of Transportation to permit commercial SST flights into the United States prior to the promulgation of supersonic aircraft noise regulations was arbitrary and capricious in view of the clear expressed will and intent of Congress in enacting the Noise Control Act of 1972?

2. Considering the expressed will and intent of Congress that supersonic aircraft noise regulations be promulgated, did the court below err in affirming the Secretary of Transportation's decision to permit such flights in the absence of such regulations?

3. Whether in the face of strong evidence that the Secretary's decision may have been influenced by factors *dehors* the record, the Court of Appeals should have remanded the cause for plenary review or to perfect the record?

Statutory Provisions Involved

(Texts are set forth in the Appendix)

Federal Aviation Act §§611 & 1001, 49 USC §§1431 & 1486

Administrative Procedure Act 5 USC §706

Noise Control Act of 1972, §§2 & 12(a), 42 USC §§4901 & 4911

Statement of the Case

On February 4, 1976 William T. Coleman Jr., U. S. Secretary of Transportation directed the Federal Aviation Administrator to "order provisional amendment of the operations specifications[1] of British Airways and Air France, to permit those carriers, for a period of no longer than 16 months from the commencement of commercial service" to conduct flights of the Concorde Supersonic Transport (SST) into the United States specifically Dulles International Airport in Virginia and John F. Kennedy International Airport (JFK) in New York. (Secretary's Decision on Concorde Supersonic Transport, p. 3) Superficially, the Secretary's decision was preceded by: a) applications by British Airways and Air France for such amendment in August and September of 1975, b) publication by the Federal Aviation Administration (FAA) of a draft environmental impact statement (EIS) on March 3, 1975, c) a series of public hearings in April 1975, d) release of

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[1] The requirement that foreign air carriers operate in accordance with "operations specifications" is the mechanism which gave rise to Secretary Coleman's decision and is found in Part 129 of the Federal Aviation Regulations, 14 C.F.R. Part 129. "Operations specifications" are not mentioned in any statute. They were devised by the Federal Aviation Administration pursuant to its authority under three sections of the Federal Aviation Act of 1958: (1) §601(a)(6), 49 U.S.C. §1421; (2) §313(a), 49 U.S.C. §1354(a); and (3) §1102, 49 U.S.C. §1502. Under the requirement, foreign air carriers must apply for operations specifications, or an amendment thereto, before operating an airplane to and from the United States. They must list the type of aircraft to be flown, the airports to be served, and the routes and flight procedures to be followed by a particular airplane. The amendments sought by British Airways and Air France, and granted by Secretary Coleman, permit those two carriers to conduct two daily Concorde flights each to John F. Kennedy International Airport (JFK) in New York and one daily Concorde Flight each to Dulles International Airport (Dulles) in Virginia, a total of six take-offs and six landings in the United States each day.

the final EIS on November 13, 1975, and e) a public hearing on the final EIS on January 5, 1976.

With the announcement of Secretary Coleman's decision, the petitioners, as large suburban counties[2] directly affected by the proposed *Concorde* operations, filed a petition in the Court of Appeals for the District of Columbia under 49 U.S.C. §1486 to review and set aside the Secretary's decision. Simultaneously, the Circuit Court was asked to consider an appeal from the U. S. District Court in an action previously commenced by the petitioners seeking injunctive relief against the implementation of the Secretary's order to the FAA Administrator, and for other relief. This petition seeks to review that portion of the Court's judgment affirming the Secretary's decision of February 4th, 1976.

Subsequent to the filing of Fairfax and Nassau's petition to review in the Court of Appeals, the FAA Administrator caused the operations specifications to be amended and the matter was set down for oral argument on May 19, 1975 at 1 P.M., five days before the inaugural commercial Air France flight was scheduled to arrive in the United States.[3] Underscoring the international importance attached to

[2] Dulles International Airport is partially located in Fairfax County which has a population of approximately 600,000 people; Nassau County, New York has a population of 1.5 million people, of whom over 225,000 reside under or within the sonic "footprint" of proposed SST arrivals and departures at John F. Kennedy International Airport (JFK) located in adjacent Queens County.

[3] By resolution of the Board of Commissioners of the Port Authority of New York and New Jersey (the proprietor of John F. Kennedy Airport) Concorde flights into the New York area are prohibited for six months pending study of the effects of SST arrivals into Dulles. An action to enjoin the Port Authority enforcing this regulation by Air France and British Airways is pending in the U. S. District Court for the Southern District of New York and scheduled for trial in September of 1976.

this event the President of France Monsieur Giscard D'Estaing himself arrived for a state visit via *Concorde* on May 18th. At 5 o'clock in the afternoon of May 19 the Court of Appeals affirmed, without opinion, the Secretary's decision. (App. p. 1a)

REASONS FOR GRANTING THE WRIT

I.

The decision of the Secretary of Transportation permitting commercial SST flights into the United States prior to the promulgation of supersonic aircraft noise regulations directly contradicts the expressed will and intent of Congress; as such its affirmance in the Court below presents special and important questions of federal law which should be settled by this honorable Court.

Section 611 of the Federal Aviation Act of 1958, (49 U.S.C. §1431), as amended by the Noise Control Act of 1972, imposes a nondiscretionary duty on the Federal Aviation Administrator, after consultation with the Secretary of Transportation and with the Environmental Protection Agency, to promulgate in a timely fashion aircraft noise regulations aimed at protecting residents in areas near airports from excessive aircraft noise. Section 611 (c) establishes a detailed procedure and specific time schedule for the development of such regulations.

Pursuant to this mandate, the Administrator or his predecessors, did cause rules to be promulgated regulating future *subsonic* aircraft (14 C.F.R. §36; FAR, part 36). But the treatment of supersonic aircraft was markedly different. To date, some eight and one-half years after §611 was enacted and four years after the passage of the

Noise Control Act, the FAA Administrator has utterly failed and refused to promulgate regulations providing for the control and abatement of aircraft noise and sonic boom relative to such *supersonic* aircraft.

Secretary Coleman pointed this out in his decision at p. 15 when he said "[t]he Administrator has exercised this authority with respect to subsonic aircraft, [citing 14 C.F.R., §36] but he has not promulgated a noise rule applicable to supersonic aircraft, although the EPA has proposed several alternatives." It is submitted that the nondiscretionary character of this duty to promulgate noise regulations was established by Congress which reviewed this legislative mandate on at least two recent occasions and, congressional intent in this area is abundantly clear.

The nondiscretionary character of the Administrator's duty is emphasized by the use of the verb "shall", Congress having made a point of selecting mandatory rather than permissive language in enacting Section 611. (H.R. Rep. No. 1463, 90th Cong. 2nd Sess. 2 (1968) note 16, at 5). As the House Committee on Interstate and Foreign Commerce explained:

> ". . . the introduced bill merely *authorized* the establishment of standards, rules and regulations and their application in the certification process. The bill reported by the committee (and enacted) *requires* their establishment and application." *Id.* (Emphasis in original)

See 114 Cong. Rec. 16384-99 (House), 20915-31 (Senate) (1958)

The persistent failure of the FAA to enact supersonic noise regulations pursuant to §611 as originally enacted spurred Congress to amend it when it considered the Noise

Control Act of 1972, 42 USC §4901 *et seq.* Congressional debate was rife with repeated criticism of FAA and its failure during the preceding three and one-half years to develop aircraft noise standards.

> Senator Percy: *"The FAA has abdicated the regulatory responsibilities Congress has entrusted to it."* 118 Cong. Rec. 18006 (1972)
>
> Senator Muskie: *"The Federal Aviation Administration has had this responsibility since its inception. It had a specific legislative mandate for the past four years. And its record is wholly inadequate."* 118 Cong. Rec. 17755 (1972)[4]

Despite the passage of more than four years since the enactment of the Noise Control Act and the clear time schedule provided therein, the FAA has adamantly refused to develop supersonic noise standards. The conclusion that the FAA has breached its statutory duty is inescapable.

Nor was the effect of the FAA's nonaction lost upon the Secretary. At page 17 of his decision, he said, "I must therefore conclude that the absence of a noise rule promulgated under the Federal Aviation Act does not compel a decision either way on whether the Concorde should be permitted to land." In thus supporting his decision, Mr. Coleman took advantage of the dereliction of duty by the Federal Aviation Administrator to authorize *Concorde* flights on the specious ground that there is no statute or regulation prohibiting the same. It is submitted that such decision is unconscionable, and seeks to take immoral ad-

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[4] *Accord:* 118 Cong. Rec. 18005 (remarks of Senator Buckley), 1516 (remarks of Representative Mikva), 1530 (Remarks of Representative Gude), 1530 and 1510-11 (remarks of Representative Addabbo), 1516 (remarks of Representative Ryan), 1523 (remarks of Representative Drinan), 1515-16 (remarks of Representative Wydler).

vantage of the unreasonable delay in the promulgation of supersonic noise regulations imposed upon the Administrator as a matter of law.

That it was Congress' intent to have supersonic noise regulations implemented before SSTs were placed in service is evident from the Senate debates before enactment. In the words of Senator Tunney, "It is my expectation and the Senate's clear intention that such [noise emission limitation] standards be proposed and implemented for supersonic transports under the provision of this bill before such aircraft are in commercial service" (118 Cong. Rec. 18645 [1972] see also 118 Cong. Rec. 17782 [remarks of Sen. Muskie], 18000 [Remarks of Sen. Case]).

Nor are local governmental units completely free to protect themselves by restricting operations of such aircraft into airports within their jurisdiction since this Court has ruled that the field of aircraft noise regulation was preempted. In *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624 (1973) it reasoned that a pervasive system of federal regulation was being established and that the procedures of the Noise Control Act of 1972 were being implemented to protect the local populations. Tragically, four years after that decision, we are still without noise regulations protecting the citizenry from supersonic air transport noise.[5]

Moreover, Secretary Coleman's decision renders the citizen's suit provisions of the Noise Control Act [42 USC §4911] meaningless since such suits envision enforcement of federal regulations, e.g. supersonic noise restrictions.

[5] Arguing that failure to regulate is a waiver of such preemption by the Federal Government, County of Fairfax has recently enacted a local law and ordinance compelling supersonic aircraft to meet the same noise standards as had been previously promulgated by the FAA for subsonic aircraft.

In the absence of such regulations such suits are precluded leaving no remedy against SST noise emissions.

In summary, Secretary Coleman's decision to allow the *Concorde* SST to operate at Dulles and JFK on a commercial basis flies in the face of the Noise Control Act of 1972 and its amendment to Section 611. By authorizing SST landings in the United States *before* the mandated noise standards for SSTs are promulgated, the Secretary of Transportation has contravened the will of Congress and repudiated the purpose of the Act. Absent the right to restrict such flights by local law or citizens suits, the Petitioners and their constituents are without redress. Under such circumstances, judicial intervention to prevent frustration of the statutory scheme envisioned by Congress is clearly warranted. *See Parker* v. *United States*, 309 F. Supp. 593 (D. Colo. 1970), *aff'd* 448 F. 2d 793 (10th Cir. 1971).

II.

In order to protect the integrity of federal judicial review of administrative decisions this Court should grant certiorari to review the failure of the court below to remand for plenary review in the face of strong evidence that the Secretary's decision may have been influenced by factors *dehors* the record.

In announcing his decision to permit the *Concorde* SST to land in the United States, Secretary Coleman carefully delineated those documents, facts and events upon which he based his decision. He stated in part, at p. 2:

> "Today's decision is based entirely on my review of the EIS, on the January 5 hearing and on my subsequent review of the transcript and other written materials submitted for the record. At the public hearings, the

United Kingdom's Minister of State for the Department of Industry and France's Director of Air Transport, Civil Action Department, each testified that there was no expressed or implied commitment that the United States and no one has brought to my attention any such expressed or implied agreement."

In the Secretary's decision, and subsequently in written and oral argument, the government has repeatedly sought to limit the scope of review to certain carefully structured documents and happenings which, when taken at face value, should inexorably lead to a finding of compliance with the standards for judicial review set forth in the Administrative Procedure Act, 5 U.S.C. §706.

After the Secretary's decision and, indeed, after the exchange of briefs, a Congressional subcommittee under Congressman Lester Wolff made available to petitioner's counsel a raft of internal Department of Transportation memorandum, letters and correspondence which support, by at least fair preponderance, the strong conviction that the decision to admit the *Concorde* SST into the United States was prompted by factors outside the record and was made principally by governmental officials other than the Secretary. These documents, produced by the Department of Transportation before the subcommittee on Future Foreign Policy Research and Development (House Committee on International Relations) and the subcommittee on Government Activities and Transportation (House Committee on Government Operation) deal primarily with the Executive decision-making process involving *Concorde* during the latter part of 1972 and early 1973.

Among the documents produced is a White House memorandum dated November 27, 1972 from Peter M. Flanigan addressed to Secretaries of State, Treasury, Commerce

and Transportation and to the Assistants to the President for National Security Affairs and Domestic Affairs. (App. p. 22a) In this confidential memorandum, Mr. Flanigan outlined the problems of the use of the *Concorde* in the United States to be discussed at a Senior Review Group meeting at the White House on December 11, 1972.

Of particular interest (aside from the technical discussion) is the delineation of three major options open to the Administration re *Concorde*: "(1) to seek actively to support the *Concorde*, (2) to proceed vigorously with U. S. environmental standards and insist that the *Concorde* must comply; and (3) take an essentially hands-off attitude allowing matters to work themselves out without intervention by the White House."

In discussing option 1 the 1972 memorandum sets forth what appears to be the "game plan" which culminated in Secretary Coleman's decision in 1976. Mr. Flanigan writes, "Under option 1, FAA would postpone a final rule on noise type certification standards for civil supersonic aircraft. . . The *Concorde's* certification and use would be treated as a unique situation meriting special consideration in respect to U. S. regulations governing supersonic aircraft and where possible, waivers or exemptions would be accorded when and where necessary to allow the aircraft to operate in this country. Actions on problems affecting the *Concorde* will be taken on a case-by-case basis as they arose, with consideration given where possible to postponement of actions which would, in effect, bar the aircraft." (App. p. 26a)

At the December 11, 1972 meeting among others in attendance were D.O.T. Undersecretary James Beggs and Mr. John Barnum, General Counsel [now Undersecretary] Department of Transportation. (App. p. 33a) Missing from the material produced is the memorandum from Mr. Flani-

gan documenting the course of action agreed to at this meeting, although such is referred to in a memorandum to the Secretary from Undersecretary of Transportation Beggs, dated December 27, 1972 (App. p. 20a) Mr. Beggs refers to the final link in the decision making process thusly: "the next step will be the President's replies to Heath and Pompidou. I'll keep you informed as significant developments occur." (App. p. 21a)

This final link is embodied in a letter to President Pompidou dated January 19, 1973 over the signature of Richard Nixon in which the former President states in part, "I can assure you, however, that to the extent that noise and other regulations are within the purview of the Federal Government, my Administration will assure equitable treatment for the Concorde. In keeping with this policy, the Federal Aviation Administration will issue its proposed fleet noise rule in a form that will make it inapplicable to the Concorde." (App. p. 17a) A letter similar in text and content was delivered to the British Embassy in Washington on January 22 entitled "President's Reply to Heath Letter" and in which Mr. Nixon states: "As a consequence of this policy, the Federal Aviation Administration will issue its proposed fleet noise rules in a form which will make it inapplicable to the Concorde." (App. p. 19a)

In view of these documents, the authenticity of which is uncontested, it is submitted that there is now before the Court some evidence to support petitioner's contention that the Secretary's decision may well have been influenced or governed by factors *dehors* the record. Since the present record fails to mention these factors, or whether they were considered, it was impossible for the Court of Appeals to determine if the Secretary acted within the scope of his authority or whether his action was justifiable under the applicable statutes and standards.

Section 706 requires a finding by the reviewing tribunal that the decision made was not "arbitrary, capricious and abusive, or otherwise not in accordance with law." To make this finding, the reviewing Court must consider whether the decision was based on a consideration of the relevant factors and whether there had been a clear error of judgment.

But the Administrative Procedure Act scope of review as interpreted by this Court does not require the reviewing tribunal to blindly accept the "record" as presented to it, unmindful of indisputable facts *dehors* the record which would compel a reasonable man to conclude that such record was willfully and woefully incomplete.

But no administrative decision should be based upon a record that is so incomplete either intentionally or through inadvertence. In such instance, the integrity of the scope of judicial inquiry demands that those administrative officials who participated in the decision give testimony to explain their action. In truth that may be "the only way there can be effective judicial review" in this case. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971) at 420.

And while Courts are reluctant to require administrative officials who participated in a decision to give testimony explaining their action, such inquiry may be made where there is a "strong showing of bad faith or improper behavior." *Citizens to Preserve Overton Park* v. *Volpe, supra,* at 420.

The problem created here by an incomplete and inadequate record and the facts underlying the entrance of the *Concorde* into the United States require at the very least a remission to the District Court for development of a full record, or in the alternative, a plenary inquiry into the underlying facts.

No controvery is more fateful both to the environment of the Eastern seaboard of the United States and to the delicate relations with Great Britain and France than that posed by this application for certiorari. The very integrity of the scope of judicial review is at stake, and such controversy is especially suited for determination by the Courts of the United States under the guidance of this honorable Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

Order of United States Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 76-0139

[No Opinion]

September Term, 1975—Filed May 19, 1976

No. 76-1105

ENVIRONMENTAL DEFENSE FUND, INC.,

Petitioner,

v.

U.S. DEPARTMENT OF TRANSPORTATION and
WILLIAM T. COLEMAN, JR., Secretary,

Respondents,

BRITISH AIRWAYS BOARD *et al.*,

Intervenors.

No. 76-1213

THE STATE OF NEW YORK,

Petitioner,

v.

U.S. DEPARTMENT OF TRANSPORTATION and
WILLIAM T. COLEMAN, JR., Secretary,

Respondents,

COMPAGNIE NATIONALE AIR FRANCE *et al.*,

Intervenors.

Order of United States Court of Appeals
for the District of Columbia Circuit

No. 76-1259

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *et al.*,
Appellants,

v.

JOHN L. MCLUCAS, Administrator,
FEDERAL AVIATION ADMINISTRATION, *et al.*

No. 76-1260

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA,
a body corporate, *et al.*,
Petitioners.

v.

WILLIAM T. COLEMAN, JR. and U.S. DEPARTMENT
OF TRANSPORTATION,
Respondents.

No. 76-1321

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *et al.*,
Petitioners.

v.

JOHN L. MCLUCAS *et al.*,
Respondents.

Petitions for Review of an Order of the Secretary of Transportation and an Order of the Administrator of the

Order of United States Court of Appeals
for the District of Columbia Circuit

Federal Aviation Administration and Appeal from the United States District Court for the District of Columbia.

Before:

WRIGHT, MCGOWAN and ROBB,
Circuit Judges.

ORDER

These causes came on to be heard on petitions for review of an order of the Secretary of Transportation, on a petition for review of an order of the Administrator of the Federal Aviation Administration, and on appeal from the United States District Court for the District of Columbia, and were argued by counsel.

The Secretary has decided, for the reasons stated in his opinion, "to permit British Airways and Air France to conduct limited scheduled commercial flights into the United States for a period not to exceed sixteen months under limitations and restrictions set forth [in that opinion]." The purpose of the trial period is to provide additional information to assist the Secretary in his evaluation of the "environmental, technological, and international considerations" which continued operation of Concordes into this country would involve.

This court is in agreement with the Secretary that in the circumstances of this case his order for such a trial period is within his authority and competence, and is not arbitrary or capricious or otherwise in violation of law.

On consideration of the foregoing, it is ORDERED by the court that the order of the Secretary is hereby affirmed.

Order of United States Court of Appeals for the District of Columbia Circuit

It is FURTHER ORDERED by the court that the petition for review in No. 76-1321 is hereby dismissed.*

It is FURTHER ORDERED by the court that the appeal in No. 76-1259 is dismissed for want of jurisdiction. *See* Rule 54(b), Fed. R. Civ. P.

Per Curiam

For the Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

* This action is without prejudice to consideration and disposition by the District Court of the mandamus action in Civil Action No. 76-0139.

Statutes Involved

§ 611 of the Federal Aviation Act of 1958, 49 U.S.C. § 1431, as amended by the Noise Control Act of 1972.

§ 1431. Control and abatement of aircraft noise and sonic boom—Definitions

(a) For purposes of this section:

(1) The term "FAA" means Administrator of the Federal Aviation Administration.

(2) The term "EPA" means the Administrator of the Environmental Protection Agency.

CONSULTATIONS; STANDARDS; RULES AND REGULATIONS; AIRCRAFT CERTIFICATES

(b) (1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this subchapter. No exemption with respect to any standard or regulation under this section may be granted under any provision of this chapter unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation

requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted.

(2) The FAA shall not issue an original type certificate under section 1423(a) of this title for any aircraft for which substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic boom, consistent with the consideration listed in subsection (d) of this section.

SUBMISSION OF PROPOSED REGULATIONS TO FAA BY EPA; PUBLICATION; HEARING; REVIEW OF PRESCRIBED REGULATIONS; REPORT AND SUPPLEMENTAL REPORT

(c) (1) Not earlier than the date of submission of the report required by section 4906 of Title 42, EPA shall submit to the FAA proposed regulations to provide such control and abatement of aircraft noise and sonic boom (including control and abatement through the exercise of any of the FAA's regulatory authority over air commerce or transportation or over aircraft or airport operations) as EPA determines is necessary to protect the public health and welfare. The FAA shall consider such proposed regulations submitted by EPA under this paragraph and shall, within thirty days of the date of its submission to the FAA, publish the proposed regulations in a notice of proposed rulemaking. Within sixty days after such

publication, the FAA shall commence a hearing at which interested persons shall be afforded an opportunity for oral (as well as written) presentations of data, views, and arguments. Within a reasonable time after the conclusion of such hearing and after consultation with EPA, the FAA shall—

(A) in accordance with subsection (b) of this section, prescribe regulations (i) substantially as they were submitted by EPA, or (ii) which are a modification of the proposed regulations submitted by EPA, or

(B) publish in the Federal Register a notice that it is not prescribing any regulation in response to EPA's submission of proposed regulations, together with a detailed explanation providing reasons for the decision not to prescribe such regulations.

(2) If EPA has reason to believe that the FAA's action with respect to a regulation proposed by EPA under paragraph (1) (A) (ii) or (1) (B) of this subsection does not protect the public health and welfare from aircraft noise or sonic boom, consistent with the considerations listed in subsection (d) of this section, EPA shall consult with the FAA and may request the FAA to review, and report to EPA on, the advisability of prescribing the regulation originally proposed by EPA. Any such request shall be published in the Federal Register and shall include a detailed statement of the information on which it is based. The FAA shall complete the review requested and shall report to EPA within such time as EPA specifies in the request, but such time specified may not be less than ninety days from the date the request was made.

The FAA's report shall be accompanied by a detailed statement of the FAA's findings and the reasons for the FAA's conclusions; shall identify any statement filed pursuant to section 4332(2) (C) of Title 42 with respect to such action of the FAA under paragraph (1) of this subsection; and shall specify whether (and where) such statements are available for public inspection. The FAA's report shall be published in the Federal Register, except in a case in which EPA's request proposed specific action to be taken by the FAA, and the FAA's report indicates such action will be taken.

(3) If, in the case of a matter described in paragraph (2) of this subsection with respect to which no statement is required to be filed under such section 4332(2) (C) of Title 42, the report of the FAA indicates that the proposed regulation originally submitted by EPA should not be made, then EPA may request the FAA to file a supplemental report, which shall be published in the Federal Register within such a period as EPA may specify (but such time specified shall not be less than ninety days from the date the request was made), and which shall contain a comparison of (A) the environmental effects (including those which cannot be avoided) of the action actually taken by the FAA in response to EPA's proposed regulations, and (B) EPA's proposed regulations.

CONSIDERATIONS DETERMINATIVE OF STANDARDS, RULES, AND REGULATIONS

(d) In prescribing and amending standards and regulations under this section, the FAA shall—

(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this chapter and chapter 23 of this title;

(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

(3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

(4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

(5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section.

AMENDMENT, MODIFICATION, SUSPENSION, OR REVOCATION OF CERTIFICATE; NOTICE AND APPEAL RIGHTS

(e) In any action to amend, modify, suspend, or revoke a certificate in which violation of aircraft noise or sonic boom standards or regulations is at issue, the certificate holder shall have the same notice and appeal rights as are contained in section 1429 of this title, and in any appeal to the National Transportation Safety Board, the Board may amend, modify, or reverse the order of the FAA if it finds that control or

abatement of aircraft noise or sonic boom and the public health and welfare do not require the affirmation of such order, or that such order is not consistent with safety in air commerce or air transportation.

Pub.L. 85-726, Title VI, § 611, as added Pub.L. 90-411, § 1, July 21, 1968, 82 Stat. 395, and amended Pub.L. 92-574, § 7(b), Oct. 27, 1972, 86 Stat. 1239.

§ 2 of the Noise Control Act of 1972, 42 U. S. C. § 4901.

§ 4901. Congressional findings and statement of policy

(a) The Congress finds—

(1) that inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population, particularly in urban areas;

(2) that the major sources of noise include transportation vehicles and equipment, machinery, appliances, and other products in commerce; and

(3) that, while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources in commerce control of which require national uniformity of treatment.

(b) The Congress declares that it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare. To that end, it is the purpose of this chapter to establish a means for effective coordination of Federal research and activities in noise control, to authorize the establishment of Federal noise emission standards for products distributed in commerce, and

to provide information to the public respecting the noise emission and noise reduction characteristics of such products.

Pub.L. 92-574, § 2, Oct. 27, 1972, 86 Stat. 1234.

§ 12(a) of the Noise Control Act of 1972, 42 U.S.C. § 4911

§ 4911. Citizen suits—Authority to commence suits

(a) Except as provided in subsection (b) of this section, any person (other than the United States) may commence a civil action on his own behalf—

(1) against any person (including (A) the United States, and (B) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any noise control requirement (as defined in subsection (e) of this section), or

(2) against—

(A) the Administrator of the Environmental Protection Agency where there is alleged a failure of such Administrator to perform any act or duty under this chapter which is not discretionary with such Administrator, or

(B) the Administrator of the Federal Aviation Administration where there is alleged a failure of such Administrator to perform any act or duty under section 1431 of Title 49 which is not discretionary with such Administrator.

The district courts of the United States shall have jurisdiction, without regard to the amount in con-

troversy, to restrain such person from violating such noise control requirement or to order such Administrator to perform such act or duty, as the case may be.

NOTICE

(b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the violation (i) to the Administrator of the Environmental Protection Agency (and to the Federal Aviation Administrator in the case of a violation of a noise control requirement under such section 1431 of Title 49) and (ii) to any alleged violator of such requirement, or

(B) if an Administrator has commenced and is diligently prosecuting a civil action to require compliance with the noise control requirement, but in any such action in a court of the United States any person may intervene as a matter of right, or

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice to the defendant that he will commence such action.

Notice under this subsection shall be given in such manner as the Administrator of the Environmental Protection Agency shall prescribe by regulation.

INTERVENTION

(c) In an action under this section, the Administrator of the Environmental Protection Agency, if not a party, may intervene as a matter of right. In an action under this section respecting a noise control requirement under section 1431 of Title 49, the Administrator of the Federal Aviation Administration, if not a party, may also intervene as a matter of right.

LITIGATION COSTS

(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate.

OTHER COMMON LAW OR STATUTORY RIGHTS OF ACTION

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any noise control requirement or to seek any other relief (including relief against an Administrator).

"NOISE CONTROL REQUIREMENT" DEFINED

(f) For purposes of this section, the term "noise control requirement" means paragraph (1), (2), (3), (4), or (5) of section 4909(a) of this title, or a standard, rule, or regulation issued under section 4916 or 4917 of this title or under section 1431 of Title 49.

Pub.L. 92-574, § 12, Oct. 27, 1972, 86 Stat. 1243.

Statutes Involved

Federal Aviation Act, Section 1001; 49 U.S.C. 1486

§ 1486. Judicial review

ORDERS SUBJECT TO REVIEW; PETITION FOR REVIEW

(a) Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

VENUE

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

NOTICE TO BOARD OR ADMINISTRATOR; FILING OF RECORD

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of Title 28.

POWER OF COURT

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to

Statutes Involved

affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

CONCLUSIVENESS OF FINDINGS OF FACT; OBJECTIONS

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

REVIEW BY SUPREME COURT

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of Title 28.

Pub.L. 85-726, Title X, § 1006, Aug. 23, 1958, 72 Stat. 795; Pub.L. 86-546, § 1, June 29, 1960, 74 Stat. 255; Pub.L. 87-225, § 2, Sep. 13, 1961, 75 Stat. 497.

Administrative Procedure Act, 5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and

determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

Text of President Nixon's Letter of January 19, 1973 to President Pompidou

As you know, I have followed the progress of the Concorde for many years. Therefore, I particularly welcome your recent letter discussing the prospects and the problems which it may face in conforming to certain proposed Federal regulations on excessive aircraft noise.

This Administration is committed to the principle that governments should minimize interference with commercial transactions whether the purchasers be private parties or other governments and to the principle of non-discriminatory formulation and application of Federal regulations. Accordingly, I am sure that United States officials will make every effort to see that the Concorde can compete on its merits for sales in this country.

You must know, Mr. President, that many aspects of regulation of civil aviation are outside the jurisdiction and the control of the executive branch of our Federal Government. The Congress, the Civil Aeronautics Board at the Federal level, as well as State and local governments, have substantial powers in this field. I can assure you, however, that to the extent that noise and other regulations are within the purview of the Federal Government, my Administration will assure equitable treatment for the Concorde. In keeping with this policy, the Federal Aviation Administration will issue its proposed fleet noise rule in a form which will make it inapplicable to the Concorde. I have also directed officials of my Administration to continue to work with representatives of the French and British governments in order to determine whether a United States supersonic aircraft noise standard can be developed which will meet our domestic requirements without inhibiting the prospects of the Concorde.

With warm personal regards.

Sincerely, Richard Nixon.

Text of President Nixon's Letter of January 19, 1973 to Prime Minister Heath

(See Opposite) ☞

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

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EB/TT - MR. MEADOWS
EUR/NE - MR. BECELIA (SUB)
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SUBJ: CIVAIR - CONCORDE: PRESIDENTS REPLY TO HEATH LETTER

1. FOR EMBASSY'S INFORMATION, FOLLOWING IS TEXT, AS RECEIVED FROM WHITE HOUSE, OF PRESIDENT NIXON'S REPLY OF JAN. 19, 1973 TO PRIME MINISTER HEATH'S LETTER OF DEC. 11, 1972 CONCERNING THE CONCORDE:

"DEAR MR. PRIME MINISTER:

I WELCOME YOUR RECENT LETTER CONCERNING THE PROBLEMS WHICH THE CONCORDE MAY FACE IN CONFORMING TO PROPOSED FEDERAL REGULATIONS ON EXCESSIVE AIRCRAFT NOISE. THIS IS, AS WE BOTH RECOGNIZE, AN ISSUE OF MAJOR IMPORTANCE WITH BOTH DOMESTIC AND INTERNATIONAL RAMIFICATIONS.

I CAN ASSURE YOU THAT MY ADMINISTRATION WILL MAKE EVERY

DEPARTMENT OF TRANSPORTATION
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EFFORT TO SEE THAT THE CONCORDE IS TREATED FAIRLY IN ALL ASPECTS OF UNITED STATES GOVERNMENTAL REGULATION, SO THAT IT CAN COMPETE FOR SALES IN THIS COUNTRY ON ITS MERITS. AS A CONSEQUENCE OF THIS POLICY, THE FEDERAL AVIATION ADMINISTRATION WILL ISSUE ITS PROPOSED FLEET NOISE RULE IN A FORM WHICH WILL MAKE IT INAPPLICABLE TO THE CONCORDE.
I HAVE ALSO DIRECTED OFFICIALS OF MY ADMINISTRATION TO CONTINUE TO WORK WITH REPRESENTATIVES OF THE BRITISH AND FRENCH GOVERNMENTS IN ORDER TO DETERMINE WHETHER A UNITED STATES SUPERSONIC AIRCRAFT NOISE STANDARD CAN BE DEVELOPED THAT WILL MEET OUR DOMESTIC REQUIREMENTS WITHOUT DAMAGING THE PROSPECTS OF THE CONCORDE.

YOU HAVE NOTED, MR. PRIME MINISTER, THAT MANY ASPECTS OF THE REGULATION OF CIVIL AVIATION ARE IN THIS COUNTRY OUTSIDE THE JURISDICTION OF THE EXECUTIVE BRANCH OF OUR FEDERAL GOVERNMENT. YOU MUST ALSO KNOW THAT THE FEDERAL GOVERNMENT'S POWER TO INFLUENCE THESE ASPECTS, PARTICULARLY WITH REGARD TO STATE AND LOCAL JURISDICTIONS, IS LIMITED. ON THE OTHER HAND, MY ADMINISTRATION IS COMMITTED TO PRINCIPLES OF NON-INTERFERENCE WITH FREE AND PRIVATE COMMERCE AND NON-DISCRIMINATORY FORMULATION AND APPLICATION OF FEDERAL REGULATIONS. WE WILL ACT IN KEEPING WITH THESE PRINCIPLES TO ASSURE EQUITABLE TREATMENT FOR THE CONCORDE, BEARING IN MIND THAT IT, LIKE ALL SUPERSONIC AIRCRAFT, RAISES UNPRECEDENTED PROBLEMS OF ENVIRONMENTAL AND SOCIAL COSTS.

WITH WARM PERSONAL REGARDS, "

2. REPLY DELIVERED UK EMBASSY WASHINGTON JAN. 22. COPIES BOTH LETTERS AIRPOUCHED EMBASSY.

EXEMPT ROGERS

James M. Beggs' Memorandum of December 27, 1972

[EMBLEM]

THE UNDER SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

December 27, 1972

(With TAB A Attached)

MEMORANDUM FOR: The Secretary

SUBJECT: Concorde Noise Problems

Attached (TAB A) is a memorandum from Peter Flanigan documenting the course of action agreed to at a December 11, 1972 meeting at the White House.

Strong letters to the President from President Pompidou and Prime Minister Heath were received during the week of December 11. While we do not have copies, they essentially express British and French concern about the impact of the proposed noise NPRM's on the Concorde. They have not been replied to as yet, but I understand they will indicate our intentions as outlined in paragraphs numbered 1 and 2 of Flanigan's memorandum.

On December 20th, we met with a high level Anglo-French team here at DOT, as we had previously agreed. (Roster of particulars attached, TAB B). At the outset of the meeting, we explained the extent and nature of current U.S. environmental concerns and the foreseen impact of the new Noise Control Act, advised them we were prepared to exchange technical (not political) information on the NPRM's and the Concorde, and informed them that, by

law, we were required to place a summary of the substantive points discussed during the meeting in the NPRM's official docket, which would be made available to the public when the NPRM's were issued. (The Anglo-French team have agreed to provide us with a draft report, which, subject to our concurrence, will be placed in the docket).

Predictably, the Concorde team then proceeded to recite a number of technical and procedural points arguing in favor of issuance of a proposed NPRM on SST noise which incorporated an exception for the Concorde, granted on the basis utilized for the early models of the Boeing 747: i.e., an application for a type certificate for the 747 was made before FAR 36 was issued.

In response to a direct question, we informed them that we did not expect that a noise NPRM would be promulgated before mid-January because of the need, under the new Noise Act, to receive EPA's initial comments. (They are expected to cursory: EPA will indicate interest and reserve the right to comment further.)

The tone of our meeting was cordial; as was the case with separate meetings the Concorde team leaders held the following day with Secretary Rogers, Peter Flanigan, and me. I understand that essentially the same points were made with Flanigan and Rogers as with me: they indicated the extent of their concern with the possible negative impacts of the proposed rules on the Concorde.

The next step will be the President's replies to Heath and Pompidou. I will keep you informed as significant developments occur.

/s/ J.M.B.
James M. Beggs

Peter M. Flanigan's Memorandum of November 27, 1972

CONFIDENTIAL

THE WHITE HOUSE
WASHINGTON

November 27, 1972

MEMORANDUM FOR: THE SECRETARY OF STATE
THE SECRETARY OF THE TREASURY
THE SECRETARY OF COMMERCE
THE SECRETARY OF TRANSPORTATION
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS
ASSISTANT TO THE PRESIDENT FOR DOMESTIC AFFAIRS

Attached is a memorandum describing the problems connected with the certification of the Concorde for use in the US and presenting three optional courses of action. I trust you will be able to attend a Senior Review Group meeting to discuss these options in the Roosevelt Room on Monday, December 11, at 3:30 P.M.

/s/ PMF
Peter M. Flanigan

PROBLEMS AFFECTING THE USE OF THE CONCORDE IN THE UNITED STATES

There are a number of problems facing the Administration with the expected entry into service of the Anglo-French *Concorde* in 1975. On the one hand there will be very strong pressures from the British and French governments to gain approval of the *Concorde* by the U.S. Government. On the other we anticipate increasing Congressional and public pressures to ban the *Concorde* because it does not and probably cannot meet U.S. environmental standards, particularly with respect to noise.

A summary of the more important problems and anticipated U.S. actions which will impact on the *Concorde* follows (these problems are outlined in more detail in Tabs A through H.)

The distinction between *certification* and *use* should be borne in mind in considering the effects of anticipated U.S. government actions on the *Concorde*. In order for U.S. airlines to operate this aircraft, it must be issued a type certificate by the Federal Aviation Administration. Actions such as establishing noise standards for civil supersonic aircraft bear only on type certification and will determine whether the *Concorde* can be sold to U.S. airlines. On the other hand there are actions such as setting fare levels and operating procedures which will affect the use of the aircraft in the U.S. by foreign air lines, even if type certification is not granted. Finally, there are actions such as the application of engine emission standards which will affect *both certification* and *use*.

A prompt decision is needed as to whether the FAA should issue a Notice of Proposed Rule Making in regard to the fleet noise levels of U.S. airlines.

A. The FAA is anxious to release immediately a notice of proposed rule making (NPRM) which would progressively reduce the average level of noise in U.S. airline fleets until all aircraft meet current standards. Given the high noise level of the *Concorde*, this rule on fleet noise

would discourage possible U.S. purchases of the aircraft. Because certain states have taken action on noise standards due to the alleged failure of the Federal Government to establish such standards, FAA feels under great pressure to release this NPRM immediately. This rule itself would affect only U.S. purchasers of the *Concorde* and would not prevent its operation in U.S. airspace by foreign operators.

B. The FAA also has ready for publication an NPRM which requires that SST's meet the subsonic noise standards of FAA Part 36. Since the *Concorde* will not meet this standard, the British and French will undoubtedly request an exemption. Such request of course will meet with opposition from environmentalists and a high level decision will undoubtedly be required. This rule by itself would affect only U.S. purchasers of the *Concorde* and would not prevent its operation in U.S. airspace by foreign operators.

C. The *Concorde* will have difficulty meeting an FAA safety requirement on fueling-inerting for type certification and rules governing operation of aircraft in U.S. airspace.

D. The Environmental Protection Agency (EPA) has developed a rule governing engine emissions which *Concorde* may not be able to meet. This rule is being reviewed by the OMB because of its possible economic impact on certain U.S. aircraft.

E. There is a possibility of direct Congressional action through legislation to prohibit the operation in U.S. air-

space of any SST which does not meet current subsonic noise standards. The President would be under great pressure from the environmentalists to sign such a bill which the British and French would consider an unfriendly act.

F. The CAB insists that the fares established for the *Concorde* be economic and cover costs. This could mean a *Concorde* fare so high that few people would utilize it.

G. Notwithstanding any Federal action regarding *Concorde,* U.S. airport operators could well decide simply to ban the aircraft because of local reaction.

H. There is public and Congressional concern that commercial operation of civil supersonic transports would adversely affect the environment.

We feel the Administration is faced with three major options: (1) to seek actively to support the *Concorde,* (2) to proceed vigorously with U.S. environmental standards and insist that the *Concorde* must comply; and (3) to take an essentially hands-off attitude allowing matters to work themselves out without intervention by the White House. (We point out that Administration decisions may well be inhibited or preempted by Congressional action or local airport authority rules).

Option 1:

Notify the British and French of the problems facing the *Concorde* in the U.S. and indicate that the Administration is prepared to do what is possible to admit the aircraft.

Peter M. Flanigan's Memorandum of November 27, 1972

Under Option 1, FAA would postpone a final rule on noise type certification standards for civil supersonic aircraft (the fleet noise rule could be published, however). The *Concorde's* certification and use would be treated as a unique situation meriting special consideration in respect to U.S. regulations governing supersonic aircraft and where possible, waivers or exemptions would be accorded when and where necessary to allow the aircraft to operate in this country. Actions on problems affecting the *Concorde* would be taken on a case-by-case basis as they arose, with consideration given where possible to postponement of actions which would, in effect, bar the aircraft. U.S. airlines may well decide on economic grounds not to purchase the *Concorde,* which would render U.S. actions on certification of the aircraft moot.

Advantages

(a) Would counteract British and French suspicions that U.S. seeks to bar *Concorde* for commercial advantage.

(b) Would permit the investigation of novel solutions to problem of *Concorde* noise, including the use of airports such as Bangor, Maine, where noise may not be crucial problem.

(c) Would permit the U.S. to have some bargaining leverage with the British and French for a period of time.

Disadvantages

(a) Congress could take initiative and legislatively bar *Concorde* from the U.S.

Peter M. Flanigan's Memorandum of November 27, 1972

(b) President could be subject to domestic criticism that Administration favored British and French at expense of legtimate U.S. environmental interest.

Option 2

Proceed vigorously with U.S. envi. nmental standards and insist that the *Concorde* must comply.

In implementing Option 2 we would inform the French and British that the *Concorde* does not appear to be able to meet the U.S. environmental standards which will apply to the aircraft in the areas of noise and engine emissions and we are not in a position to waive these standards for the *Concorde.* FAA would issue the NPRM on noise type certification requirements as well as the fleet noise NPRM and proceed expeditiously to a final rule.

Advantages

(a) Would be applauded by environmentalists.

(b) Would lessen legislative initiatives to regulate or bar SSTs, thus giving the Administration more flexibility in dealing later on with advanced SST's (including U.S.).

Disadvantages

(a) Would provoke strong reaction from British and French possibly including higher European Economic Community tariffs and additional preferences to European aircraft over U.S.-manufactured transports.

Option 3:

Permit the various problems to work themselves out without intervention by the White House.

Peter M. Flanigan's Memorandum of November 27, 1972

Under Option 3 the British and French would simply be informed of the various difficulties in the U.S. facing the *Concorde*. They would be advised that the responsible U.S. agencies are examining these difficulties and will keep in touch with the British and French on developments. The questions on certification, noise levels, and engine emissions would be decided on their merits and the British and French would be given every opportunity to present their case for the *Concorde*. FAA would issue the NPRM on supersonic noise levels and act on any resulting application for a waiver.

Advantage

(a) Would avoid domestic criticism that the President has been influenced by British and French.

(b) Would put British and French on notice of problems facing *Concorde* in U.S.

Disadvantage

(a) Might result in stringent regulations for SST use which would preclude not only *Concorde*, but any future U.S. SST from being operated in this country.

(b) Would result in strong reaction, and possible retaliation by British and French should the *Concorde* be kept out.

Peter M. Flanigan's Memorandum of December 19, 1972

CONFIDENTIAL

THE WHITE HOUSE
WASHINGTON

DEC 19 1972

MEMORANDUM FOR: THE SECRETARY OF STATE
THE SECRETARY OF THE TREASURY
THE SECRETARY OF COMMERCE
THE SECRETARY OF TRANSPORTATION
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS
ASSISTANT TO THE PRESIDENT FOR DOMESTIC AFFAIRS

Attached is a set of minutes of the meeting held on December 11, 1972 which dealt with problems connected with the certification of the Concorde for use in the United States.

PETER M. FLANIGAN

MINUTES OF REVIEW GROUP DISCUSSION OF PROBLEMS CONNECTED WITH CERTIFICATION OF THE CONCORDE FOR USE IN THE UNITED STATES

Roosevelt Room
The White House

December 11, 1972
3:30-5:00 p.m.

Attending were: Secretary Rogers, Under Secretary Volker, Under Secretary Beggs, Assistant Secretary Gibson, Assistant Secretary Hazard, Mr. Barnum, Mr. Rein, Mr. Sonnenfeldt, Mr. Gunning and Mr. Flanigan.

Peter M. Flanigan's Memorandum of December 19, 1972

Mr. Flanigan had circulated prior to the meeting as a basis for the discussion a memorandum titled "Problems Affecting the Use Of The Concorde In The United States". The Secretary of Transportation also circulated before the meeting a memorandum setting forth the DOT recommendations on issues set forth in the memorandum circulated by Mr. Flanigan.

The meeting opened, after a statement by Mr. Flanigan, with comments by Secretary Rogers on the nature of the Concorde problems and the importance of the Concorde to the British and French governments. Mr. Beggs then gave a description of the history and status of FAA rule-making proceedings which affect the Concorde: the fleet noise rule and the adoption of noise standards for supersonic aircraft. He pointed out that no publication had been made on the fleet noise rule whereas a proposed rule to apply subsonic noise standards (FAR 36) to supersonic aircraft had been published in 1970. He also indicated that Boeing 747s built after the promulgation of FAR 36 had been exempted from its terms until later models were able to comply and that those exempted 747s and many other aircraft (such as the Boeing 707) built before adoption of FAR 36 do not comply with those noise standards and have not been required to be retrofitted to do so.

The meeting then dealt with eight specific issues affecting the Concorde.

The following decisions were unanimously approved after individual discussion:

1. *Fleet Noise Rule:* DOT will redraft the advanced notice of the proposed rule on consultation with Mr. Rein so as to exempt the Concorde, directly or in-

Peter M. Flanigan's Memorandum of December 19, 1972

directly from its terms. This draft will be delivered to the White House so that the timing of its release can be coordinated properly with other foreign policy considerations.

2. *Supersonic Noise Standards:* At the time that the advanced notice of the proposed fleet noise rule is released an announcement will be made that once comments on it are received, NPRM's will be published simultaneously with respect both to the fleet noise rule and the supersonic noise standards. A joint environmental impact statement on the two rules will also be filed when the NPRM's are published.

3. *Fuel System Safety and Operating Rules:* The question of a nitrogen inerting system for the Concorde fuel tanks is a technical safety question and will be left to the judgment of the FAA. Messrs. Barnum and Rein will look into whether the U.S. can impose nitrogen inerting system requirements on airplanes flown into the U.S. by non-U.S. flag carriers.

Unless the FAA argues strongly that the special operating procedures requested for the Concorde are also safety problems, we will attempt to be cooperative on this issue, particularly if the Concorde is limited to landing at Dulles (and possibly a few other airports).

4. *Engine Emissions:* EPA is to publish an NPRM on December 12 with respect to airplane engine emissions. It was reported that the standards would be effective for planes built after 1975 with exemptions possibly through 1978. Since the British and French have not viewed this proceeding with great alarm, and in light of the possibility of exemptions until 1979, the

Peter M. Flanigan's Memorandum of December 19, 1972

Administration will take no action on this subject. However, Mr. Rein will brief the British and French representatives on the impact of the proposed rule on the Concorde.

5. *Possible Congressional Action Against Concorde:* This will be faced on an issue by issue basis. If the British and French want to know our general attitude toward anti-Concorde legislation, they should be cited to our opposition to the Granston Amendment this fall.

6. *Rates and Fares:* This is completely within the province of the CAB. Thus the Administration will not become involved in questions of ticket prices for the Concorde.

7. *State, Local and Proprietor Regulations:* DOT presently asserts that it has the legal authority to preempt state and local noise regulations although there is some law and argument to the contrary. The Administration will not now seek to make federal noise regulations preempt state and local noise regulations. It is noted in this regard that Britain and France plan to make only one airport in each country available to the Concorde.

8. *Environmental Affect:* DOT has studies underway on possible environmental affects of the Concorde. These studies will be continued.

In addition to the foregoing, it was agreed that DOT would provide Mr. Flanigan with estimates of the economic impact of the fleet noise rule and the EPA engine emission standards on U.S. airlines.

John W. Barnum's Memorandum of January 26, 1973

EYES ONLY

January 26, 1973

Concorde

General Counsel

The Secretary

The FAA has instructions to publish an advance notice of proposed rules making (ANPRM) concerning the fleet noise level (FNL) of air carriers engaged in interstate air commerce, and expressly excluding air carriers engaged (or to the extent they are engaged) in foreign air commerce (*i.e.*, international). This rule would therefore not be applicable to Concorde insofar as the North Atlantic is concerned, and Pan Am and the other American carriers could purchase it for that and other international routes. The British are concerned because this seems to be inconsistent with the letter the President wrote to Prime Minister Heath (and President Pompidou) in which he stated that the FNL would be "inapplicable" to the Concorde. (Copies of his two letters are attached.)

Strictly speaking, the ANPRM is applicable to Concorde because flights between California and Hawaii and Alaska, or between New York and Miami, are "interstate". Thus, the rule would apply to aircraft operated by U.S. carriers on those routes, and as a practical matter would prevent carriers from using Concordes on those routes.

Our answer is that the stated concern of the British (and French) was that Pan Am and the other American carriers be able to purchase Concordes for use on the North

John W. Barnum's Memorandum of January 26, 1973

Atlantic, and the rule we have written will permit that. Our second answer is that writing the rule in the fashion we have done, rather than writing a rule that would expressly not apply to SSTs, is less likely to result in Congressional action banning SSTs altogether.

The White House staff thinks that we should be very firm on the present ANPRM and that we should publish it promptly. A copy of the ANPRM is also attached hereto.

Dick Skully of the FAA is invited to your 3:30 meeting with Secretary Walker. He participated in drafting this ANPRM, but he is not privy to anything more than the ANPRM. You and I have the only copies of the President's letters, although Bob Binder knows that such a letter was to be sent.

John W. Barnum

Attachments
JWBarnum:ajg:TGC-1:1/26/73

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-231

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA AND THE COUNTY OF NASSAU, NEW YORK,
Petitioners,

v.

WILLIAM T. COLEMAN, JR., et al.,

and

BRITISH AIRWAYS, COMPAGNIE NATIONALE AIR FRANCE, AND PACIFIC LEGAL FOUNDATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT PACIFIC LEGAL FOUNDATION IN OPPOSITION

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SUBJECT INDEX

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-231

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA AND THE COUNTY OF NASSAU, NEW YORK,
Petitioners,

v.

WILLIAM T. COLEMAN, JR., et al.,

and

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BRIEF FOR RESPONDENT PACIFIC LEGAL FOUNDATION IN OPPOSITION

OPINIONS BELOW

The Decision of the Secretary of the Department of Transportation on the Concorde supersonic transport is unreported, but copies have been lodged separately with this Court. The Order of the United States Court of Appeals for the District of Columbia Circuit affirm-

ing the Decision of the Secretary of Transportation is also unreported, but is set forth in the Appendix to the Petition for Certiorari (Pet. App. 1a-4a).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the decision of the Secretary of Transportation to allow a limited trial period of flights of the Concorde supersonic transport into the United States prior to the promulgation of supersonic aircraft noise regulations was within the authority and discretion of the Secretary when such trial period is, *inter alia,* for the purpose of aiding in the promulgation of such regulations.

2. Whether the court of appeals below erred in choosing to believe the statement of the Secretary of Transportation that his decision to permit limited trial flights of the Concorde supersonic transport was based entirely upon the record before him, rather than believing the petitioners' allegations that such decision was influenced by other considerations not of record.

STATUTE INVOLVED

The provisions of Section 611 (49 U.S.C. § 1431) of the Federal Aviation Act of 1958, as amended by the Noise Control Act of 1972, are set forth in Pet. App. 5a-10a.

STATEMENT OF THE CASE

This case involves the ongoing attempt by the Board of Supervisors of Fairfax County, Virginia and the County of Nassau, New York to stop the Concorde supersonic transport aircraft (SST) from operating

in the United States for a test period of sixteen months. It involves an effort to stop the development of a new, first generation, technology which has shortened long-distance, trans-oceanic travel time by one-half and improved communications between nations. It involves an effort by petitioners to overturn an exemplary governmental decision which is a model of completeness and accuracy and which carefully balances all relevant factors—and which arrives at a conclusion extremely favorable to the public interest. And, this case involves an attempt by petitioners to deal a harsh blow to two traditional friends of the United States, the United Kingdom and the Republic of France, who have made a massive commitment of human, technological, economic, and other resources to the project which the petitioners would have this Court stop.

Simply put, Fairfax and Nassau Counties want to "stop Concorde" because they do not like it. The losing litigants do nothing more than advance a myopic construction of a statute, the relevance of which to this case is not demonstrated; and a question of fact that was not accepted by the court of appeals below.

The Concorde SST is the result of over a decade of cooperative effort by the governments and private industry of the United Kingdom and the Republic of France. These two nations committed thirteen years and $3 billion to the project. The result, the Concorde, is capable of carrying 100 passengers at a cruising speed of 1,300 miles per hour—twice the speed of sound. It is presently in limited commercial operation by British Airways and Air France on the Washington to London and Washington to Paris routes. It has reduced the flying time between those cities from seven to three and one-half hours. So far, the results demonstrate that it is a technological marvel; its chances for

commercial success are good; and it is environmentally sound. In short, all of the dire predictions made by Fairfax County and others below about the Concorde have failed to materialize. On the contrary: the Concorde works.

The decision to permit " . . . limited scheduled commercial flights into the United States for a trial period not to exceed 16 months under limitations and restrictions . . . "[1] (footnote omitted) was made by the Honorable William T. Coleman, Jr., Secretary of the Department of Transportation on February 4, 1976. That sixty-one page decision was made after meticulous evaluation of a record which included: a draft environmental impact statement (DEIS) (March 3, 1975) by the Federal Aviation Administration (FAA); a series of public comments on the DEIS; FAA's independent research on proposed Concorde operations; FAA's comprehensive final environmental impact statement (FEIS) (November 13, 1975); an unprecedented seven-hour public hearing conducted by the Secretary of Transportation personally on January 5, 1976, to consider public comments on the FEIS; numerous written submissions by the public following the Coleman hearing; and an Addendum to the FEIS.

After careful consideration of numerous public comments,[2] Secretary Coleman announced his favorable decision on February 4, 1976. Fairfax and Nassau Counties and others sought review of that decision in the United States Court of Appeals for the District of

[1] "The Secretary's Decision on Concorde Supersonic Transport" at 3 (Feb. 4, 1976) (hereinafter referred to as the "Secretary's Decision").

[2] Pacific Legal Foundation sponsored the oral and written testimony of four expert witnesses at the hearings before Secretary Coleman.

Columbia Circuit. Pacific Legal Foundation, as well as Air France, British Airways, and others, sought and were granted permission to intervene in all actions seeking review in the Court of Appeals. On May 19, 1976, that court affirmed the Secretary's Decision in an Order which appears at Pet. App. 1a-4a.

Apparently mindful of the folly of seeking review of the numerous other aspects of Secretary Coleman's Decision alleged to be illegal below, Fairfax and Nassau Counties now press but two claims, (a) that in reaching his conclusion the Secretary erred in permitting limited trial commercial flights of the Concorde SST into the United States in the absence of a final SST noise rule; and (b) the Secretary was untruthful in stating he had reached his decision only upon the materials of record. Neither of these two matters rises to a level of importance worthy of consideration by this Court.

Concurrently with the development of the record which led to Secretary Coleman's Decision, the Environmental Protection Agency (EPA) and the FAA were moving forward with a joint effort to promulgate a noise control rule in regard to supersonic transport aircraft as required by § 611 of the Federal Aviation Act of 1958, 49 U.S.C. § 1431, as amended by the Noise Control Act of 1972 (Pet. App. 5a-10a). The Environmental Protection Agency, as required by that statute,[3] proposed SST noise standards to FAA on

[3] Section 611 mandates a complex series of interagency maneuvers before promulgation of aircraft noise rules. Briefly summarized, the law requires EPA to propose a rule, but the FAA is given ultimate authority for review and promulgation of the rule after consultation with EPA. In the event of a disagreement between the agencies, further complex negotiations and studies are mandated.

February 27, 1975. The FAA published the proposal as a notice of proposed rule making on March 28, 1975. 40 Fed. Reg. 14093. It was then the subject of public hearings on May 16 and 22, 1975. Simultaneously, an environmental impact statement (EIS) under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* (NEPA) was begun. All of these steps are mandated by § 611 which prescribes the time periods within which the FAA must commence to act *once EPA has initiated the process.* The statute also states that FAA shall act upon an EPA proposal "[w]ithin a reasonable time after the conclusion of [the public] hearing and after consultation with EPA . . . ." § 611(c)(1). Pet. App. 7a.

The EPA's 1975 proposal was pending before FAA at the time of Secretary Coleman's January 5, 1976, public hearing on the Concorde. Part of the Secretary's consideration at that hearing was whether he could legally allow the Concorde to land in the absence of a final SST noise rule.

The record of that hearing closed January 13, 1976. The next day, EPA submitted a *new,* substantially revised SST noise proposal to FAA. Thus the entire process began again—as § 611 requires. The FAA published the proposal within thirty days. 41 Fed. Reg. 6270, 6274-6275 (Feb. 12, 1976). Public hearings were held on April 5, 1976, within sixty days of publication of the proposal in the Federal Register. At present, a new EIS is being prepared.

There is presently pending in the United States District Court for the District of Columbia an action brought by petitioner Fairfax County to compel the Administrator of FAA to adopt supersonic aircraft

noise control regulations. *Board of Supervisors of Fairfax County, Virginia, et al.* v. *McLucas,* Civil No. 76-0139 (D. D.C.). Petitioner Fairfax has there moved for summary judgment.

ARGUMENT

By no stretch of the imagination can petitioners be deemed to have met the criteria suggested in Rule 19 (1)(b) of this Court for the granting of writ of certiorari. They have pointed to no conflict between the courts below,[4] or between the order below and applicable decisions of this Court,[5] or any important federal question.[6] Nor have they demonstrated that the agency and court below departed from the accepted and usual course of judicial proceedings. On the contrary, the remedy sought—remand to a United States District Court for the finding of facts from which may be concluded the veracity of the Secretary of Transportation —would be an extreme departure from the usual deference accorded members of the Cabinet and would, indeed, constitute no more than a sniping at his personal integrity.

Concerning the noise control rule argument, petitioners' attempt to concoct an important question of federal law is fatally weak. This case goes no further than petitioners' unique desire to stop one particular type of aircraft from using certain airports in the

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[4] *National Cable Television Ass'n* v. *U.S.,* 415 U.S. 336, 340 (1974).

[5] *Teleprompter Corp.* v. *CBS,* 415 U.S. 394, 407-408 (1974).

[6] *Id.* at 399.

United States. It is but episodic.[7] They offer no federal law the Secretary may be said to have transgressed. Rather, petitioners merely allege that he has "take[n] immoral advantage" of the lack of a supersonic noise control regulation. Pet. 7-8. The Secretary's morality was not heretofore in issue and the Supreme Court of the United States is an inappropriate forum in which to seek to find arbiters thereof.

Petitioners would also have this Court review certain documentary matters (contained in Pet. App. 17a-34a) which they attempted to offer to the court of appeals below. In so doing, they merely ask this Court to review facts considered and rejected below by the court of appeals. Such an effort is hardly worthy of the attention of a Court which, in the past, has stated:

> We do not grant a certiorari to review evidence and discuss specific facts. *United States* v. *Johnson,* 268 U.S. 220, 227 (1925).

I.

The Secretary's Decision To Allow a Trial Period of Commercial Supersonic Transport Flights Into the United States in Order To Aid in Promulgation of an SST Noise Regulation Was Within His Authority and Discretion.

The thrust of petitioners' first argument is that promulgation of an SST noise rule under § 611 of the Federal Aviation Act was a legal condition precedent to landings of the Concorde SST in the United States. For various reasons, their legal analyses are in error and their factual premises are lacking in crucial detail.

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[7] "Special and important reasons" which may justify the grant of a writ of certiorari imply a reach to a problem beyond the academic or episodic—*Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 74 (1955).

The assertion that ". . . the FAA has adamantly refused to develop supersonic noise standards" (Pet. 7) could not be further from the truth. As the history of the proposed SST noise rule reveals, the FAA has acted diligently and in good faith in formulating such a regulation.

As for why an SST noise rule was not promulgated eight and one-half years ago as Fairfax and Nassau Counties apparently claim it should have been (Pet. 7), Secretary Coleman spoke of this in his Decision:

> . . . the decision not to act precipitously on supersonic aircraft should not be surprising in light of the history of the development of the supersonic transport. During the early developmental stages of this type of aircraft, both in the United States and Europe, the technological capacity to minimize the noise levels generated by an engine sufficiently powerful to drive a supersonic transport was uncertain. *Promulgation of a feasible noise rule at that time would therefore have been highly speculative.* By the time scientists had gained a sense of the limits on the ability to control supersonic aircraft noise levels, the design of the Concorde was fixed and, for all practical purposes immutable. (Emphasis added) (footnote omitted)
>
> Secretary's Decision at 15-16.

The Secretary's ultimate conclusion on this issue, made after reviewing the record and the submissions of numerous legal memoranda to him by the public, was:

> I must therefore conclude that the absence of a noise rule promulgated under the Federal Aviation Act does not compel a decision either way on whether the Concorde should be permitted to land.
>
> Secretary's Decision at 17.

This conclusion was concurred in by the Environmental Defense Fund[8] and the Environmental Protection Agency. In a subsequently submitted affidavit, the Honorable Russell Train, EPA Administrator, stated that the decision of when to issue a generally applicable SST noise rule is totally independent of the narrow question of whether to allow limited, demonstration flights of Concorde:

> It was EPA's intention that the Secretary of Transportation take into consideration its January 13, 1976, proposal in reaching his decision on February 4, 1976, concerning the British Airways and Air France applications for Concorde service into the U.S. *EPA did not intend to cause the Secretary to postpone his decision, nor did EPA intend to preempt the Secretary's authority to make a decision on the specific issue before him,* which was whether to direct the FAA to amend the operations specifications of the two foreign air carriers to allow up to six daily flights of the Concorde into two U.S. airports, John F. Kennedy International (JFK) and International Airport at Dulles (IAD), under certain restrictions, and subject to any subsequently-adopted, applicable regulations.
>
> It was EPA's intention that the FAA in accordance with the requirements of 49 U.S.C. 1431, proceed as expeditiously as possible to consider and promulgate a final rule regarding supersonic aircraft noise.[9] (Emphasis added).

[8] "We believe that this fact [the absence of an SST noise rule] is without significance to your present decision." Final Submission of the Environmental Defense Fund on the Concorde SST.

[9] Exhibit A to Memorandum of Defendants in Opposition to Plaintiffs' Motion for Preliminary Injunction, dated February 20, 1976, in *Board of Supervisors of Fairfax County, Virginia, et al.* v. *McLucas*, Civil No. 76-0139 (D. D.C.)

Thus, the two agencies, EPA and DOT[10] charged with promulgation of the noise control rule were in complete accord on the legal issue: It was within the Secretary's discretion to make the decision he did, allowing the Concorde to land at Dulles and John F. Kennedy International Airports for a limited period of time and under stringent conditions irrespective of the existence of a supersonic noise control rule. Traditionally, this Court, when confronted with a statutory construction question, "shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Further, it is unnecessary to find that the agency's "construction is the only reasonable one, or even that it is the result [the Court] would have reached . . . in the first instance . . . ." *Id.* Almost presciently this Court, in *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396 (1961), stated:

> We see no reason why we should not accord to the [Atomic Energy] Commission's interpretation of its own regulation and governing statute that respect which is customarily given to practical administrative construction of a disputed provision. Particularly is this respect due when the administrative practice at stake "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294 (1933).
>
> *Id.* at 408 (cited in *Udall* v. *Tallman, supra,* 380 U.S. at 16).

[10] The FAA is an agency within the Department of Transportation. 49 U.S.C. §§ 1655(c), 1657.

Nor does Secretary Coleman's decision contravene the remarks of Senator Tunney which petitioners offer (Pet. 8) as the definitive statement on the legislative history of this law.[11] The Senator stated that he expected a final SST noise rule to be promulgated "... before such aircraft are in commercial service." 118 Cong. Rec. 18645 (1972). No *final* decision on allowing the Concorde to engage in commercial service in the United States has been made. Coleman's February 4, 1976, Decision permits only a sixteen-month *demonstration* period. Secretary's Decision at 3. The final decision to permit commercial flights may be years away: the sixteen-month period must elapse and the Secretary has announced that an EIS must be prepared and considered before his final decision is issued. Thus, the Secretary's non-final decision must be deemed in compliance with Senator Tunney's remarks.

Furthermore, the Secretary's decision to allow trial flights of Concorde was intended to aid in promulgation of an SST noise rule. Coleman noted in his Decision that:

> The unique characteristics of Concorde noise and the publicity that has surrounded its advent may well aggravate the community's response to this source of noise. *This subjective characteristic of noise* response may best be evaluated through a controlled demonstration period of sufficient length to enable an assessment, after the initial publicity has subsided, of community reaction to Concorde noise. A demonstration will also enable additional testing at various measuring points to supplement the data contained in the EIS. The information from this demonstration will enable us to determine whether these original Concordes should be permitted to operate into designated United States airports in accordance with specified operating procedures and restrictions. *It will also provide useful information in the review and evaluation of the EPA's latest proposal for an SST noise standard,* although consideration of that standard will not be delayed until the completion of this demonstration but will proceed with deliberate speed. (Emphasis added).
>
> Secretary's Decision at 58.

[11] A closer reading of the history of the Noise Control Act indicates that Senator Tunney's remarks were an apparent attempt to make law via "legislative history" shortly after the substance of his comment had been rejected by the House of Representatives as an amendment to the Noise Control Act. 118 Cong. Rec. 644-645 (1972) (Remarks of Sen. Tunney).

His decision to allow an extremely limited number of flights for a relatively short time was entirely reasonable since it will actually foster thorough compliance with § 611. It was not at all immoral.

Finally, the petitioners' comment that they "are without redress" in regard to the absence of an SST noise rule is fallacious. As noted, they are presently actively pursuing a mandamus action to compel the FAA to promulgate an SST noise rule.[12]

II.

The Secretary's Decision Was Made Solely on the Basis of the Record.

Petitioners' insinuations that the Secretary's Decision "was prompted by factors outside the record and was made principally by governmental officials other

[12] *Board of Supervisors of Fairfax County, Virginia, et al.* v. *McLucas,* Civil No. 76-0139 (D. D.C.).

than the Secretary" (Pet. 10) are nothing more than idle speculation and gossip. In the Decision which he personally signed, Secretary Coleman states:

> Today's decision is based entirely on my review of the EIS, on the January 5 hearing, and on my subsequent review of the transcript and other written materials submitted for the record. At the public hearings, the United Kingdom's Minister of State for the Department of Industry and France's Director of Air Transport Civil Aviation Department, each testified that there was no expressed or implied commitment that the United States was obliged to permit the Concorde to land in the United States, and no one has brought to my attention any such expressed or implied agreement.
>
> Secretary's Decision at 2.

At oral argument in the court of appeals, counsel for the Department of Transportation responded to Nassau County's last minute attempt to introduce the documents (Pet. App. 17a-34a) which allegedly show "outside influence" on the Concorde decision:

> Mr. Catterson [counsel for Nassau County] comes in, in the final few minutes of the argument, and attempts to cash in on a sort of fear that we all have, and it's understandable since Watergate, that the whole thing is a fraud; that Secretary Coleman, when he said in his opinion that he had only seen things on the public record—and he says that explicitly—must have been lying: Do not believe him.
>
> Well, if it takes an affidavit from Secretary Coleman, we will supply the affidavit from Secretary Coleman, and he will swear that he is not lying.
>
> (Partial Tr. 7)

Petitioners' contentions here are of the same nature: they ask this Court to disbelieve Secretary Coleman's signed statement and urge "remission to the District Court [13] for development of a full record, or in the alternative, a plenary inquiry into the underlying facts." Petitioners' assertions are unsubstantiated, Secretary Coleman's statement is entitled to substantial credence, and petitioners' claims to the contrary simply do not rise to the level of significance required to merit the attention of this Court.[14]

Further, petitioners' assertion that these documents were not before the court of appeals is in error. They appeared as appendices in several of the petitioners' reply briefs below. Counsel for the Department of Transportation indicated at oral argument in the court of appeals that he had no objection to the court's reading them, and in fact, asked the court to take them into account. (Partial Tr. 7). He argued that these "docu-

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[13] It should be noted that the "court of first impression" in this case was the agency itself (DOT) and that direct review of the Secretary's Decision was properly brought in the court of appeals. Petitioners initially sought review of the Secretary's Decision in a district court which dismissed their case for lack of jurisdiction, indicating that petitioners should have sought direct review of the Secretary's Order in a court of appeals. *Board of Supervisors of Fairfax County, Virginia, et al.* v. *McLucas*, Civil No. 76-0139, (D. D.C.), Order of March 12, 1976. Thus petitioners' request here for "remission to the District Court" is meaningless since the question of the legality of the Secretary's Decision was never properly before a district court. Therefore, petitioners' reliance upon *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), is misplaced as that case was properly brought in federal district court. *Id.* at 406 n.7.

[14] We are unable to perceive how the issue of the credibility of the Secretary of Transportation fits into or meets any of the criteria listed in this Court's Rule 19 which requires more than insinuations as a basis for granting the writ.

ments are of historical interest only." (Partial Tr. 10). Fortunately, this last minute frantic effort by Fairfax and Nassau Counties to use the documents to prove the existence of a "deal" came to nothing: the court of appeals apparently chose to consider those documents as the historical but wholly irrelevant documents they are. In doing so, that court committed no error.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 5, 1976

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BRIEF FOR RESPONDENTS COMPAGNIE NATIONALE AIR FRANCE AND BRITISH AIRWAYS BOARD IN OPPOSITION

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BRIEF FOR RESPONDENTS COMPAGNIE NATIONALE AIR FRANCE AND BRITISH AIRWAYS BOARD IN OPPOSITION

QUESTIONS PRESENTED

1. Section 611(b)(2) of the Federal Aviation Act, as amended by the Noise Control Act of 1972, would require that, if substantial noise abatement could be achieved by prescribing noise standards and regulations for a supersonic transport aircraft, such standards and regulations must have been prescribed before

an original United States type certificate could be issued for such an aircraft, allowing it to be operated by United States air carriers. The first question presented (petitioners' questions 1 and 2) is whether Section 611, which in terms is silent on the point, also requires that noise standards and regulations for supersonic transport aircraft must be prescribed before foreign air carriers can be allowed to operate the supersonic transport Concorde in and out of United States airports.

2. In deciding that limited Concorde operations by two foreign air carriers should be permitted at two United States airports, the Secretary of Transportation stated that his decision was made solely on the basis of certain record material that he specified. The second question presented (petitioners' question 3) is whether the Court of Appeals erred in taking the Secretary at his word because documents were proffered to it showing that before the incumbent Secretary took office there had been consideration of Concorde policy issues within the Executive Branch.

STATEMENT

On February 4, 1976, the Secretary of Transportation issued his 61-page decision setting forth why he concluded that it is in the public interest of the United States to permit Air France and British Airways to conduct, subject to stringent operating limitations, up to one Concorde flight per day each into Dulles International Airport and up to two Concorde flights per day each into John F. Kennedy Airport for a demonstration period of up to 16 months.[1]

[1] While both carriers have been conducting Concorde operations at Dulles since May 24, 1976, there have been no Concorde operations at JFK as a result of the refusal of the Port Authority of New York and New Jersey to allow Concorde operations at JFK. The constitutionality of the Port Authority's refusal is presently being tested in litigation in the United States District Court for the Southern District of New York, British Airways Board v. Port Authority of New York and New Jersey, No. 76-1276 (S.D.N.Y., filed March 17, 1976).

The Secretary's decision concluded an administrative proceeding that lasted almost a full year and entailed the compilation and publication of comprehensive information on and analysis of all of Concorde's potential environmental impacts. Following the public release of this material in a detailed, four-volume environmental impact statement, the Secretary personally conducted a seven-hour public hearing at which 69 witnesses testified as to whether he should authorize the limited Concorde operations requested by the two foreign carriers.

The Secretary's decision imposed numerous conditions on the provisional operating authorizations for Concorde.[2] Under the Secretary's order, Concorde flights may not be scheduled for landing or takeoff in the United States between 10 p.m. and 7 a.m.; the Federal Aviation Administration was authorized to impose additional noise abatement procedures to minimize the noise impact of the Concorde; and the Secretary reserved the right to revoke the authorizations at any time upon four months' notice or immediately in the event of an emergency.

In addition, the Secretary's order directed the FAA to set up special Concorde noise monitoring systems at Dulles and JFK and to issue public reports on the

[2] THE SECRETARY'S DECISION ON CONCORDE SUPERSONIC TRANSPORT, pp. 3-5 (Feb. 4, 1976) (hereinafter referred to as "Concorde Decis."). If none of the other parties has lodged copies of the Decision with the Court by the completion of briefing, the present respondents will undertake to do so.

results of the monitoring on a monthly basis. These monitoring systems are in place and the required reports have been released each month since the initiation of Concorde service at Dulles.

In his decision, the Secretary fully articulated the multiple considerations that moved him to authorize a tightly-controlled 16-month trial period for Concorde service. The Secretary especially focused on the fact that Concorde's noise impacts could be most fairly assessed on the basis of an actual demonstration period, given the "subjective characteristic of noise response." The Secretary said:

> "The information from this demonstration will enable us to determine whether these original Concordes should be permitted to operate into designated United States airports in accordance with specified operating procedures and restrictions . . . . Although I am deeply concerned about the additional irritation that these few demonstration flights may cause for some individuals within the NEF 30 and 40 contours surrounding JFK and Dulles Airports, I believe that this environmental cost is outweighed by the benefits that will accrue to the American people from the demonstration.' (Concorde Decis. 58.)

The Secretary noted the absence of a regulation of general applicability prescribing noise standards for supersonic aircraft. He said that the lack of such a regulation did not compel a decision either way on the applications before him. (Concorde Decis. 17.) In this regard he pointed out that noise standards for subsonic jet aircraft, 14 C.F.R. Pt. 36, had not been adopted until after more than a decade of experience with such aircraft in commercial operations and that the standards were not made applicable to aircraft built

before the standards were adopted.[3] (*Id.* at 15 n.26.) The Secretary also noted that the current generation of Concordes is not susceptible to substantial noise reduction through modification or redesign. (*Id.* at 16-17, n.28.) In light of these considerations, the Secretary recognized that the imposition upon Concorde of noise standards that technologically could not be satisfied would be perceived abroad as an arbitrary and discriminatory act. (*Id.* at 11-12, 17, 55.) Furthermore, the Secretary said that he had "a statutory obligation" to consider, in making the Concorde decision, "the factors that the Federal Aviation Act lists as important in a decision to promulgate a noise rule" (*id.* at 17); Section 611(d)(4) of the Act requires that, in the prescription of such a rule, there be considered "whether any proposed standard is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft . . . to which it will apply . . ." 49 U.S.C. § 1431(d)(4).

Along with its extensive consideration of noise and other environmental factors, the decision weighed additional important factors that the Secretary was required to take into account by virtue of his office and pursuant to statutory requirements. Among these were considerations of aviation and transportation technology, international relations, and United States treaty obligations. Further, as the Secretary pointed out in his decision, British and French officials affirmed in testimony during the January 5, 1976, Concorde hearing that their governments made no claim of any

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[3] As a result of this limitation, coupled with the slow pace of replacement of older commercial subsonic jets, roughly *80%* of the subsonic jets in service in the United States today are, like Concorde, not subject to the FAA's noise regulation, 14 C.F.R. Pt. 36.

outstanding United States commitment respecting authorizations for Concorde service by the two foreign carriers. (Concorde Decis. 2.)

The Secretary made clear that he based his decision solely on certain materials of record that he specified.

> "Today's decision is based entirely on my review of the EIS, on the January 5 hearing, and on my subsequent review of the transcript and other written materials submitted for the record." (*Id.*)

Petitions for review of the Secretary's decision were filed, briefed and argued by the petitioners and others in the court below. These respondents, the interested foreign carriers Air France and British Airways, intervened in support of the decision. In a *per curiam* order issued on May 19, 1976, the day it heard argument, the Court of Appeals (Wright, McGowan and Robb, JJ.) affirmed the Secretary's decision. The court said:

> "This court is in agreement with the Secretary that in the circumstances of this case his order for such a trial period is within his authority and competence, and is not arbitrary or capricious or otherwise in violation of law." (Pet. 3a.)

REASONS FOR DENYING THE WRIT

Neither question presented by petitioners satisfies the criteria of Rule 19 of the Rules of this Court. The first (which petitioners for some reason divide into their questions 1 and 2) is a simple issue of statutory construction that is most unlikely to recur. There is no conflict among the circuits, and on the merits the issue is not even close. The court below was clearly correct in concluding that, in respect of the issue that

petitioners raise here and in all other respects, the Secretary's order was "within his authority and competence. . . ."

The other question was not even presented to the court below until oral argument, although the documents that are said to give rise to the question were appended to reply briefs of several petitioners below, including the petitioners here, to bolster other arguments. Stripped of petitioners' rhetoric, the question is whether the existence of documents disclosed by the Secretary himself, which indicated a lively interest in broad issues of Concorde policy within the Executive Branch at some time before the incumbent Secretary took office, is inconsistent with the Secretary's representation that his decision was based on a record that did not include such documents. Of course, there is no inconsistency. There is certainly nothing in the Court of Appeals' implicit rejection of the last-minute desperation argument based on the documents to warrant further review by this Court.

1. Petitioners invite the Court to review the decision below so that it may write into Section 611 of the Federal Aviation Act as amended by the Noise Control Act of 1972, 49 U.S.C. § 1431, a requirement that Congress eschewed. Petitioners' argument is that Section 611 prohibited the Secretary from amending the operations specifications of the two respondent foreign air carriers to allow specified Concorde service until the FAA had first adopted noise regulations for supersonic aircraft.

Such a requirement is not contained in Section 611 or in any other provision of law. Section 611(b)(2) *does* identify the one specific licensing action that in many cases at least must be preceded by the adoption

of noise regulations applicable to the aircraft licensed: issuance of an original United States type certificate under Section 603(a) of the Federal Aviation Act, 49 U.S.C. § 1423(a).[4] Such a certificate would be required if United States domestic carriers sought to engage in Concorde operations; in that event, the certificate could not be issued without prior adoption of SST noise regulations or, alternatively, a finding that substantial noise abatement could not be achieved for Concorde through valid noise regulations.

The reason why this condition precedent has been specified with respect to issuance of a United States type certificate is readily apparent. Once an aircraft has been awarded such a certificate, it can be expected to be placed in service to airports throughout the country by the major United States carriers. The issuance of a United States type certificate therefore has a broad impact on the overall aircraft noise situation in the United States.

The Secretary's decision had nothing to do with the issuance of an original United States type certificate for Concorde. It merely directed temporary amendments of the operations specifications of two foreign carriers, affecting operations at only two United States airports. Congress did not make noise standards a prerequisite to that kind of licensing action.

Because Section 611 clearly does not in terms contain the requirements that petitioners would write into it, they resort to selected snatches of legislative history to supply what is lacking in the text. However, Section

[4] Even the issuance of a type certificate does not require the prior adoption of noise regulations in the case of an aircraft for which substantial noise abatement cannot be achieved by prescribing such regulations. § 611(b)(2), 49 U.S.C. § 1431(b)(2).

611 unambiguously identifies the sole licensing action to which the promulgation of noise standards is a prerequisite. When there is no ambiguity, resort to legislative history is dubious at best. Regardless of that, the bits of legislative history that petitioners invoke are clearly insufficient to justify the result they seek.

Indeed, the only arguably pertinent legislative history cited by petitioners is Senator Tunney's remark that it was his "expectation" and "the Senate's clear intention" that supersonic noise standards be promulgated before any supersonics could enter commercial service. (Pet. 8.) What the Senator's quoted remarks and the petitioners' brief fail to disclose is that the remarks were made after the House had declined to accept a Senate-cleared amendment to the noise control legislation that, if enacted, would have put into effect the very "expectation" and "intention" referred to. In fact, that amendment would have applied the FAA's existing subsonic noise standards to supersonic aircraft without any further inquiry or study.[5] Senator Tun-

[5] That amendment, proposed by Senator Cranston, would have provided as follows:

> "No civil aircraft capable of flying at supersonic speed shall land at any place under the jurisdiction of the United States unless in compliance with the noise levels prescribed for subsonic aircraft by the Administrator of the Federal Aviation Administration and in effect on September 1, 1972." 118 Cong. Rec. 35879 (1972).

Even the Senate's passage of that amendment was apparently based upon the fundamental misconception that it was technically feasible for Concorde to be adjusted to meet the Part 36 noise regulations. See 118 Cong. Rec. 18001 (1972) (Remarks of Sen. Cranston.) The Cranston amendment was neither included in the version of the bill approved by the House nor finally enacted. It was in that context, in an apparent effort to salvage by legislative history what could not be enacted into law, that the remarks of Senator Tunney quoted by petitioners were made. See 118 Cong. Rec. 37318 (1972) (Remarks of Sen. Tunney).

ney was obviously trying to salvage what he could from a disappointing legislative defeat.

The personal expectations of a Senator and even the "clear intention" of one house of Congress are not law. Statements of such expectations and intentions may illuminate ambiguous provisions of statutes that are the law. In this case, however, the language of Section 611 is specific and unambiguous in identifying the one type of licensing action which may require prior promulgation of a noise standard. That type of action was simply not involved in the Secretary's decision.

2. Petitioners assert in substance that the Secretary's careful opinion and the comprehensive administrative record underlying it are merely a ruse—that "the decision to admit the Concorde SST into the United States was prompted by factors outside the record and was made principally by governmental officials other than the Secretary." (Pet. 10.) This audacious assertion comes in the face of Secretary Coleman's express assurance that the decision was his own and was based entirely on his review of the administrative record. In its invocation of communications from then-President Nixon to the President of France and the Prime Minister of the United Kingdom, it ignores the Secretary's statement that representatives of the French and British Governments "each testified that there was no express or implied commitment that the United States was obliged to permit the Concorde to land in the United States, and no one has brought to my attention any such express or implied agreement." (Concorde Decis. 2.)

The support petitioners offer for their grave allegations of bad faith on the part of a Cabinet officer and

two foreign governments is embarrassingly thin. Appended to their petition are six documents (Pet. 17a-33a) that were not included in the administrative record, do not mention Secretary Coleman, were written three years before he became Secretary and bear on matters relevant only tangentially, if at all, to the decision to permit the Concorde demonstration. Of the six documents that petitioners apparently think make their best case, only four were first disclosed after the Secretary's decision. (See Pet. 10.) The other two—the Nixon letters to the French President and the British Prime Minister—had been public for weeks. Presumably, these letters were among the very factors that prompted the Secretary to ask the British and French officials who appeared before him whether they claimed that any commitment had been made by the United States government to admit the Concorde to United States airports.

In any event, nothing in the documents casts the slightest shadow on the independence of the Secretary's decision and, certainly, nothing in them justifies the extraordinary step of intruding into the thought processes of an official who has already explained the reasons for his action forthrightly and in painstaking detail.

Petitioners' documents date from a two-month period in late 1972 and early 1973 and relate to the Nixon Administration's attempt to formulate a response to the request of the British and French Governments for equitable treatment of the Concorde.

The documents reveal an effort—much like Secretary Coleman's own decision—to chart a delicate course that would at once avoid unnecessarily antagonizing

America's allies while going forward with the implementation of America's domestic environmental and aviation policies.

Even if petitioners' documents reflected something more than normal interagency coordination to formulate diplomatic policy on a sensitive issue—and even a casual reading will show that they do not—the fact remains that they relate to regulatory actions that were not only never taken but are today of merely historical interest. Two proposed FAA programs were dealt with in the documents: a so-called "fleet-noise rule," under which an average noise level would be established for the aircraft fleets of United States carriers, and a so-called "FAR 36 rule," under which supersonic aircraft operated by domestic carriers would be required to meet existing noise standards for subsonic aircraft. The "fleet-noise rule" was never adopted because it was unworkably complicated. The "FAR 36 rule" was rejected because intervening events—notably the domestic carriers' loss of interest in the SST—made it unnecessary. But, even more important, neither of these abortive regulations could have affected the authority of Air France and British Airways to operate their own Concordes to the United States. By their terms, they were limited to type certification, a requirement of the Federal Aviation Act that plainly affects only the aircraft of domestic air carriers.[6] As a result, their sole relevance to the Concorde could only be in the context of possible Concorde purchases by domestic airlines. This point is emphasized in one of petition-

[6] By virtue of § 501(b)(1) of the Federal Aviation Act, 49 U.S.C. § 1401(b)(1), the type certification procedures of § 603, 49 U.S.C. § 1423, apply "only to aircraft owned by a citizen of the United States."

ers' documents, Mr. Flanagan's memorandum of November 17, 1972, which states that each rule "would affect only U.S. purchasers of the Concorde and would not prevent its operation in U.S. airspace by foreign operators." (Pet. 23a-24a.)

The issue for the Secretary was the entirely different one of whether to permit overseas Concorde flights by British Airways and Air France to land at Dulles and Kennedy airports. As a result, there is no reason why he should have taken into account the internal documents adduced by petitioners, even if he were acquainted with them. The documents do not mention Secretary Coleman and contain no ground for the slightest inference of any impropriety on his part. They do not even hint at a reason for not accepting at face value his designation of the materials he considered in making his decision and his disclaimer of having relied on anything else.

Because the idea that the Secretary's decision was dictated by others is sheer fantasy, there is no justification for making what petitioners describe as a "plenary inquiry into the underlying facts." (Pet. 13.) This Court's seminal decision in *United States* v. *Morgan*, 313 U.S. 409 (1941), makes it clear that the validity of agency action must be judged solely by the agency's formal findings and reasons and not by an after-the-fact attempt to reconstruct the mental processes of the decision-maker. In *Morgan*, an order of the Secretary of Agriculture was attacked on the ground that the Secretary had "prejudged" the issues before him. This charge of prejudgment was based on a letter the Secretary wrote to the New York Times criticizing an earlier decision of this Court reversing a previous department order. Much as petitioners

would have this Court direct, the District Court authorized the petitioners to take the Secretary's deposition, and he "was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record, and his consultation with subordinates." 313 U.S. at 422. Speaking through Mr. Justice Frankfurter, the Court condemned in the strongest terms this wasteful and demeaning invasion of the Secretary's decision-making processes:

> "But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary 'has a quality resembling that of a judicial proceeding.' *Morgan* v. *United States*, 298 U.S. 468, 480. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that 'it was not the function of the court to probe the mental processes of the Secretary.' 304 U.S. 1, 19. Just as a judge cannot be subjected to such a scrutiny, . . . so the integrity of the administrative process must be equally respected." *Id.*

To engage in a similar interrogation of Secretary Coleman would be equally unjustified and even more unseemly.[7] The Secretary has explained his action in an opinion that is a model of reasoned and candid agency decision-making. He has explicitly disavowed

[7] The Court's decision in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1972), intimates that testimony from administrative officials who participated in the decision, while "usually to be avoided," may be proper upon a "strong showing of bad faith or improper behavior." Needless to say, petitioners have not come close to making this strong showing. Cf. Bank of Commerce of Laredo v. City National Bank of Laredo, 484 F.2d 284, 287-288 (5th Cir. 1973).

the existence of any hidden Administration commitments that could prejudge the issues before him, and representatives of the French and British governments have offered similar denials. The evidence produced by petitioners does not even remotely suggest the contrary. Like any other agency official who has taken the trouble to explain his actions, Secretary Coleman should therefore be judged by what he has said and by the hearing transcripts, studies and many other documents that he has identified as the underlying basis for his decision. It is a tribute to the quality of the Secretary's decision that the sitting panel of the court below, treated to the same scandalous accusations of bad faith that are set forth in the petition, sustained the decision summarily on the day the argument was heard.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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opposition

No. 76-231

In the Supreme Court of the United States

OCTOBER TERM, 1976

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, AND THE COUNTY OF NASSAU, NEW YORK, PETITIONERS

v.

WILLIAM T. COLEMAN, JR., SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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ORDER BELOW

The order of the court of appeals (Pet. App. 1a-4a), affirming without opinion the decision of the Secretary of Transportation,[1] has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1976. The petition for a writ of certiorari was filed on August 16, 1976. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

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[1]For the convenience of the Court, we have lodged copies of the Secretary's opinion with the Clerk.

QUESTIONS PRESENTED

1. Whether Section 611(b)(1) of the Federal Aviation Act prohibits the Secretary of Transportation from granting temporary and conditional approval for foreign air carriers to operate the Concorde aircraft in the United States before the Federal Aviation Administration has promulgated general noise standards for the operation of supersonic aircraft.

2. Whether the court of appeals erroneously declined to remand this case to the district court to require testimony from the Secretary of Transportation concerning petitioners' charges that his decision was not, as he stated, based solely on the record in this case.

STATUTE INVOLVED

Section 611 of the Federal Aviation Act of 1958, as added, 82 Stat. 395, and amended, 86 Stat 1239, 49 U.S.C. (Supp. V) 1431, is reproduced at Pet. App. 5a-10a.

STATEMENT

1. *The Secretary's decision.* On February 4, 1976, the Secretary of Transportation, William T. Coleman, Jr., ordered the Federal Aviation Administrator to permit British Airways and Air France to conduct scheduled commercial flights from London and Paris to New York and Washington using the Concorde Supersonic Transport aircraft. The order limited permission to a test period of not longer than 16 months and imposed a number of terms and conditions upon the two air carriers, including the restriction that neither carrier operate more than two supersonic flights per day at Kennedy Airport

and one flight per day at Dulles Airport.[2] The Secretary declined to give permanent authorization for Concorde service, determining that a demonstration period was necessary to measure both the environmental impact and the commercial acceptance of the Concorde. Secretary Coleman directed that monitoring systems be installed at both United States airports to measure noise and emission levels of Concorde operations and that additional data on 12 months of Concorde flights be collected for analysis during the final four months of the demonstration period.

The Secretary's decision to admit the Concorde for a limited test period was made in response to applications filed with the Federal Aviation Administration by British Airways and Air France, seeking permanent amendment of their operations specifications to allow commercial supersonic service.[3] Recognizing that approval of the requests might be construed as "major Federal action significantly affecting the quality of the human environment," within the meaning of Section 102(2)(C) of the

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[2]Other limitations included, *inter alia*, a restriction preventing scheduled Concorde flights from arriving or departing before 7 A.M. or after 10 P.M., a prohibition against supersonic flights over the United States, a requirement that an entirely new Environmental Impact Statement be prepared prior to authorization of a greater number of flights, and a provision permitting revocation of approval for these flights upon four months' notice to the air carriers or immediately if such action be deemed in the interest of the health, safety and welfare of the American people.

[3]According to Part 129 of the Federal Aviation Regulations (14 C.F.R. Part 129), "operations specifications" must set forth the type of aircraft to be flown, the airports to be served, and the routes and flight procedures to be followed. An application for operations specifications or for amendments thereto must be approved before a foreign air carrier may begin commercial air service to and from the United States.

National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332(2)(C), the FAA began to prepare an Environmental Impact Statement in early 1975. Public hearings were held, and the Environmental Impact Statment was released in final form on November 13, 1975. On that date, the Secretary announced that he would defer action on the airlines' applications until after another public hearing on January 5, 1976. The Secretary himself chaired that hearing, which resulted in more than seven hours of testimony by proponents and opponents of the Concorde and questioning by the Secretary. Further written submissions were invited and made a part of the administrative record. The Impact Statement was then revised to reflect the information, comments and responses elicited at that hearing.

On February 4, 1976, after a thorough review of the entire record, the Secretary issued a 61-page opinion, setting forth in detail the reasons for his decision to deny permanent amendment of the operations specifications and to allow instead the 16-month demonstration period.

The opinion reviewed in detail the possible effects of Concorde operation on air quality, conservation of energy resources, potential depletion of ozone density in the stratosphere, and noise impact in the environs of the two airports involved.[4] Although the Secretary recognized that some adverse effects were likely, he found those effects to be outweighed, at least over the short term, by the

[4]The Secretary did not discuss at length the question of safety, accepting instead the conclusion of the FAA that the aircraft could be operated safely within the United States air traffic control system.

technological benefits of the Concorde and its significance with regard to international relations.

The Secretary also concluded that the absence of supersonic aircraft noise standards promulgated pursuant to Section 611 of the Federal Aviation Act did not prevent a decision whether Concorde operations should be allowed, rejecting the argument that issuance of such noise standards must precede amendment of the carriers' operations specifications. The Secretary noted that the FAA was following precisely the procedure prescribed by Section 611 in developing such noise standards and that the experience and data gained from the limited Concorde demonstration would be very useful in the ultimate development of standards, consistent with the criteria set forth in Section 611.

2. *The proceedings below.* Two weeks before the Secretary issued his decision, the Boards of Supervisors of Fairfax and Loudoun Counties, Virginia, filed an action in the United States District Court for the District of Columbia against Secretary Coleman and Administrator McLucas of the FAA, seeking to prohibit authorization of Concorde operations in the United States before general noise standards for supersonic aircraft had been promulgated by the FAA.[5] The Boards of Supervisors also sought a writ of mandamus to compel promulgation of those standards. On March 12, 1976, the district court issued an order denying plaintiffs' motion for a preliminary injunction and granting the defendants' motion to dismiss all of the case except the claim for mandamus, on the ground that jurisdiction to review the Secretary's order rested exclusively with

[5]Nassau County, New York, was added as a plaintiff after the Secretary's decision.

the court of appeals under Section 1006 of the Federal Aviation Act of 1958, 72 Stat. 795, as amended, 49 U.S.C. 1486. On March 18, 1976, the plaintiffs filed, *inter alia*, a notice of appeal and a motion for summary reversal of the district court decision, as well as a petition for review in the court of appeals.

In the interim, petitions for review of the Secretary's order were filed in the court of appeals by the Environmental Defense Fund and the State of New York. The various matters then were consolidated for purposes of argument and decision. Because the airlines had announced their intention to commence Concorde service to Washington on May 24, 1976, the court directed expedited briefing and consideration of the cases.[6] Oral argument was held on the morning of May 19, 1976. That evening the court of appeals issued a unanimous order—without opinion—affirming the order of the Secretary. On May 21, 1976, the Boards of Supervisors of Fairfax and Loudoun Counties, Virginia, and Nassau County, New York, filed an application for stay of mandate with the Chief Justice, who denied it the following day.

ARGUMENT

The decision by the court of appeals is correct and no further review is warranted.

1. Petitioners contend (Pet. 5-9) that the Secretary is prohibited by Section 611(b)(1) of the Federal Aviation Act, as amended, 49 U.S.C. (Supp. V) 1431(b)(1),

[6]On March 11, 1976, the Port Authority of New York and New Jersey adopted a resolution to ban Concorde operations at Kennedy Airport pending study of six months of Concorde operations at Dulles Airport. An action by British Airways and Air France to enjoin enforcement of that resolution is now pending in the United States District Court for the Southern District of New York.

from giving British Airways and Air France even limited approval for the conduct of transatlantic supersonic flights before the FAA has developed general noise standards applicable to supersonic aircraft. The statute contains no such prohibition. Section 611(b)(1), as amended by the Noise Control Act of 1972, 86 Stat. 1239, commits the promulgation of noise standards for supersonic transports to the reasonable discretion of the FAA, directing the agency to "prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom." Moreover, the FAA must consider, among other factors, whether any proposed standard or regulation is "economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance or certificate to which it will apply." Section 611(d)(4). The statute does not impose inflexible time limits[7] nor does it bar authorization of supersonic flights while standards are being developed. This statutory framework is in direct contrast to Section 611(b)(2), which explicitly prohibits

[7]There is no basis for petitioners' allegations (Pet. 7) of bad faith or undue delay by the FAA. The agency stands in full compliance with the timetable prescribed by Congress in Section 611(c) for the promulgation of those standards. On February 27, 1975, the Environmental Protection Agency submitted proposed supersonic aircraft noise standards to the FAA. As required, the FAA published this proposal as a notice of proposed rulemaking within 30 days thereafter. Timely public hearings were held, and the FAA began to draft an environmental impact statement on the proposed standards. The task was in progress at the time of the January 5, 1976, public hearing on Concorde service, but shortly thereafter, EPA submitted a new, substantially different SST noise proposal. The FAA once more published the proposal and again held a timely hearing. Work on the revised impact statement, which will reflect this latest EPA submission, is now underway. In the interim, the experience of limited Concorde service will be considered in the establishment of those standards.

the FAA from issuing an "original type certificate" under 49 U.S.C. 1423(a) for aircraft "for which substantial noise abatement can be achieved" unless the noise standards applicable to that aircraft first have been prescribed. That requirement, which applies only to aircraft manufactured in this country or operated by United States flag carriers, is currently inapplicable to the Concorde.

The bulk of the legislative history on which petitioners rely involves unsuccessful attempts by members of Congress to require that implementation of noise standards precede supersonic aircraft operation. The remarks of Senator Tunney (Pet. 8), for example, address a provision inserted in the Senate version of the Noise Control Act of 1972 that would have required what petitioners urge. That provision was neither included in the version approved by the House nor enacted into law. Congress more recently has again declined to enact such a requirement. On March 25, 1976, the Senate rejected a proposal by Senator Bumpers to bar operation of Concordes pending the application to supersonics of the general noise regulations presently applicable to subsonics. 122 Cong. Rec. S4338-S4342 (daily ed., March 25, 1976).

The decision of the Secretary will permit the FAA to gather a substantial body of information regarding the environmental and technological characteristics of Concorde operation for consideration in the promulgation of a general supersonic noise standard.[8] The Secretary ex-

[8]The Secretary's determination follows the pattern adopted for subsonic aircraft noise standards. The FAA promulgated those standards in 1969 as Part 36 of the Federal Aviation Regulations (14 C.F.R. Part 36), after more than a decade of jet aircraft operations during which new technologies for noise suppression had been developed. These standards, originally applicable only to aircraft types certificated after 1969, were applied in 1974 to individual aircraft of a type certificated before 1969 but not flown before 1974. Thus, promulgation of the original rule occurred after the development of technology to make new aircraft quieter; the rule was expanded in scope when that technology could be applied to new models of earlier generation aircraft.

Because replacement of older aircraft is relatively slow, more than 80 percent of the subsonic planes now in service in the United States are not required to, and do not, satisfy the F.A.R. Part 36 standards. A rule that would completely bar operation of the Concorde would have been a substantial departure from this historical pattern.

pressly recognized that this would be one benefit of a decision to authorize a demonstration of Concorde flights not to exceed 16 months (Secretary's decision, p. 58). The modest delay needed to gain such experience "may well speed achievement of the goal of pollution abatement by obviating the need for time-consuming corrective measures at a later date." *Natural Resources Defense Council, Inc.* v. *Train*, 510 F. 2d 692, 712 (C.A. D.C.).

2. Petitioners claim (Pet. 13) that "the integrity of the scope of judicial inquiry" requires a remand to secure testimony by the Secretary further explaining his action.[9]

The Secretary's comprehensive opinion explained all aspects of his decision and stated (Secretary's decision, p. 2):

> Today's decision is based entirely on my review of the EIS, on the January 5 hearing, and on my subsequent review of the transcript and other written

[9]Petitioners apparently desire a remand to the district court (Pet. 13). Since review of the Secretary's decision is entrusted to the court of appeals, 49 U.S.C. 1486(a), the basis for such a remand is not apparent.

materials submitted for the record. At the public hearings, the United Kingdom's Minister of State for the Department of Industry and France's Director of Air Transport, Civil Aviation Department, each testified that there was no expressed or implied commitment that the United States was obliged to permit the Concorde to land in the United States, and no one has brought to my attention any such expressed or implied agreement.

Petitioners rely on two letters of January 19, 1973, written by former President Nixon to former President Pompidou of France and former Prime Minister Heath of Great Britain, as well as the other internal government memoranda reprinted by petitioners (Pet. App. 17a-34a), to suggest that the Secretary's decision was based on matters outside the record. Those materials show only that the proposed Concorde flights were an issue of political sensitivity. Nothing in any of the proffered materials suggests that Secretary Coleman acted in "bad faith" or engaged in "improper behavior." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420. Further proceedings are not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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